Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1994

PRIMEDICAL INC. (AND CONTINUED INSIDE)

Petitioners,

v.

ALLIED INVESTMENT CORPORATION,

Respondent.

ON THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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67pp

QUESTION PRESENTED

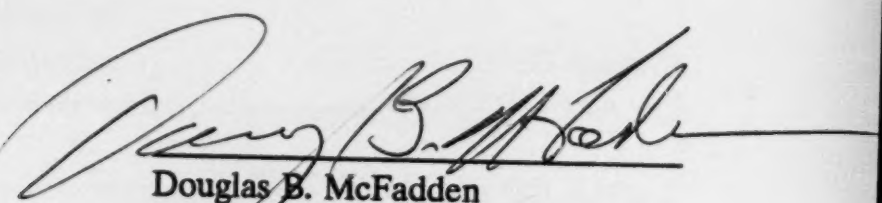
Whether the Seventh Amendment to the Constitution restricts the use of summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

PARTIES TO THE PROCEEDING BELOW AND CORPORATE DISCLOSURE STATEMENT

All appellants in the court below are petitioners herein. The parties to the proceedings in case numbers 94-7078 and 94-7151 in the Court of Appeals for the District of Columbia were:

PRIMEDICAL, INC.
FIRST FINANCIAL TRAVEL SERVICES
GLENN R. MATHIAS, JR.
MHA FINANCIAL CORP.
BRUCE S. OLD
M. CALHOUN COLVIN, JR.
MILDRED J. COLVIN
ROBERT A. SHEPARD
EUGENIA M. SHEPARD
CHARLES B. WELBORN
BEVERLY WELBORN
KENNETH C. KEENER
COASTAL GENERAL FINANCIAL ADVISORS, INC.
JAMES M. ADAMS
JOHN BEFFANO
GEORGE CARYOTAKIS
ROSE CHAPMAN
HUGH DELANEY
MICHAEL DELVECCHIO
DAVID C. DORRER
LEROY ALLEN
TERRENCE M. FLAHERTY
WILLIAM E. KUYKENDAHLL
DONALD H. LINCOLN

IRVING R. PARSONS
JOE SEBEK
JAMES M. TINSLEY
PRIMEDICAL ASSOCIATES 1986-II LIMITED PARTNERSHIP L. HARRISON PILLSBURY
DAVID J.JOHNSON
DAVID STERN
PETER N. JUNG
ALLIED INVESTMENT CORPORATION
HUMANA, INC.
PRIMEDICAL CORPORATION
PRIMEDICAL LIMITED PARTNERSHIP I



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ON THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in Case Nos. 94-7078 and 94-7151 on March 13, 1995.

OPINION BELOW

The underlying opinion of the Court of Appeals is unreported and is appended hereto (A-24). The Court of Appeals order denying rehearing is appended hereto (A-29). The opinion of the District Court is unreported and appended hereto (A- 1).

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on March 13, 1995. Rehearing was denied by the Court of Appeals on April 7, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitution of the United States, Amend. 7 provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried to jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Rule 56(e) of the Federal Rules of Civil Procedure provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT OF THE CASE

This is a civil action brought by owners and investors against a venture capital firm, for diverting a corporate opportunity through the creation of a corporation to hold the assets of the opportunity and issuance of all the stock to itself and none of the stock to the investors.

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Petitioners filed their complaint in the District Court on August 1, 1990, demanded a trial by jury, and amended complaint thereafter. The respondent filed a motion to dismiss. The District Court on September 28, 1992, granted the motion to dismiss as to part of the amended complaint but denied it as to counts for breach of fiduciary duty, tortious interference, breach of contract

and conversion. On October 13, 1992, respondents filed their answer which was amended by leave of court on March 11, 1993 that added the statute of limitations as an affirmative defense. The District Court set the case for trial on three separate occasions, each of which was vacated. On March 31, 1994, the District Court granted respondent's summary judgment. Petitioners filed a notice of appeal on April 11, 1994 (Appeal No. 94-7078). Thereafter, petitioners filed a motion to vacate the judgment which was denied. A notice of appeal from that order was filed on July 22, 1994 (Appeal No. 94-7151).[1] The cases were consolidated on appeal. Jurisdiction of the District Court was founded on 28 U.S.C. § 1332.

STATEMENT OF FACTS

Primedical Inc. ("PMI") was formed as a Maryland corporation in 1983 to own and operate ambulatory health care facilities. Stanford G. Ellsworth ("Ellsworth") became its president and Randolph B. Old ("Old") its chief financial officer. (App.[2] pp. 346-349). In 1984, Allied Investment Corporation ("Allied") a venture capital firm, began lending money to PMI. (App. pp. 361-362) PMI thereafter operated these centers in Maryland, but sought to expand its operation.

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[1]The question of violation of the Seventh Amendment was raised in both the District Court and the Court of Appeals. Neither court addressed the issue.

[2]Citations to the appendix in the Court of Appeals is "App". Citations to the appendix to this petition are preceded by A ("A-1").

In early 1986, PMI formed and sold limited partnership shares in Primedical Limited Partnership I ("PLP I") for a total of $1,201,000. (App. p. 375) In the fall of 1986, PMI formed and sold partnership shares in Primedical Limited Partnership II ("PLP II") in the sum of $751,250. (App. pp. 377-722) David Gladstone ("Gladstone"), the president of Allied, actively promoted the sale of the partnership shares. (App. pp. 363-364 and 376). PMI was the general partner of these limited partnerships.

On October 22, 1986, Humana, Inc. began negotiating to sell its ambulatory care facilities to PMI. On March 23, 1987, PMI and Humana signed a Letter of Intent for PMI to acquire 68 of the Humana owned facilities for $37.5 million. (App. pp. 770-776) On March 30, 1987, Gladstone wrote to Ellsworth that Allied would agree to invest in a new company to acquire the Humana properties, and the old shareholders of PMI would receive 30% of the new company. (App. pp. 777-806). Allied in its committment letter to PMI specifically agreed to the ownership rights of the PMI investors in the new corporation where it stated in paragraph 2.03 of the letter:

> Stanford G. Ellsworth will receive 5% ownership in the new company and Randolph B. Old will receive 5% ownership. The old stockholders of Primedical Inc. who exchange their shares for stock or options in the new company, shall receive 30% of the ownership of the new company. Thus, ownership will be 10%

> top management. 30% [sic] old stockholders and 60% new investors. The old stockholders would increase in ownership depending on performance of 2.04 below. (App. page 778).

The committment was agreed to and signed by Ellsworth for PMI which was the general partner of the two partnerships.[3] These sixty-eight (68) centers were located throughout the United States and constituted substantial expansion of PMI's operation.

On April 3, 1987, Old and Ellsworth formed a Delaware Corporation and named it Primedical Corporation ("PC"). (App. pp. 1230-1255). On April 7, 1987, PC was recorded as a Delaware Corporation by Ellsworth and his attorney Daniel Luciano ("Luciano"). No stock was issued in PC until August 4, 1987. PC was formed using PMI money by PMI officers - Old, Ellsworth and Luciano. (App. p. 1123) When PC was set up in April of 1987, it was understood that would be folded into

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[3]On April 2, 1987, Humana sought to cancel the Letter of Intent with PMI via telegram. (App. p. 991) Walter Neely, an attorney with the Humana division that managed the clinics, wrote the telegram. Upon receiving Neely's telegram, Old sent a telegram to Humana on behalf of "Primedical, Inc.," threatening to sue and stating that Humana's attempt to unilaterally cancel the Letter of Intent "constitute[d] a breach of the Letter of Intent *and subsequent contractual arrangements among the parties*. (App. p. 990) (Emphasis added.) Humana backed down, and extended the Letter of Intent until April 7, 1987. (App. p. 1117). The District Court erroneously found that the letter of intent expired. (A2-3).

PMI. (App. pp. 337-338) Old was under the clear impression that 30% of the ownership would go to the PMI shareholders and the limited partners. (App. pp. 746-763 and 1055).

On April 23, 1987, an investment agreement was prepared and signed by Gladstone for Allied and Ellsworth for PC which outlined the amount of equity that would be distributed by those investing in PC. (App. p. 1276)

On August 4, 1987, the deal was closed for PC to acquire the facilities from Humana for $37.5 million. Under the terms of the deal, Allied received 90% of the equity in PC and Old and Ellsworth later received 10%. The stockholders and limited partners of PMI received nothing. The stock in PC was issued on August 4, 1987.[4] Humana took back $10 million in debt secured by the accounts receivable with a warrant for 40% of the PC stock on default. The investment agreement of April 23, 1987, was amended on August 4,1987, to permit issuance of the warrant to Humana, which changed the ownership structure of PC.

At a meeting of PLP I, on May 25, 1988, investors learned for the first time of the creation of PC and the acquisition of the Humana properties. Coastal General Financial Advisors, Inc. was elected to replace PMI as the general partner of the two partnerships. On July 14, 1988,

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[4]Ellsworth and Old each received their 10% in stock issued on January 5, 1988.

PMI assigned its general partnership interests to Coastal, formalizing the action on May 25 and 26 after the limited partners had replaced it with Coastal as the general partner. This happened as a result of the limited partners discovery of the failure of PMI to meet its responsibilities to them. (App. pp. 1092-1098) (App. pp. 1086-1087) Also at the May meeting, a committee was established to investigate what had happened to the assets of the limited partnerships. (App. p. 1091) As a result this lawsuit was commenced on August 1, 1990.

The investors who purchased limited partnership shares were led to believe by Gladstone and others that the investors would participate in an expanded company that would be rolled over to enable them to participate. This did not happen. Gladstone and Allied promoted the sale of these shares and then diverted the assets of the partnerships to a new corporation in which the investors received nothing. Gladstone and Allied accomplished this through their control of the board of PMI and interference in the transactions of the limited partnerships.

REASONS FOR GRANTING THE WRIT

This case raises an important question of constitutional law that warrants this court granting review. Subsequent to this Court's decisions in the trilogy of

cases[5] interpreting Rule 56 of the Federal Rules of Civil Procedure, the lower federal courts have expanded the use of summary judgment to such a degree that they have in many instances usurped the function of the jury and violated the Seventh Amendment to the Constitution which guarantees the right to trial by jury in civil cases. This is just such a case.

In none of the trilogy cases did this Court address whether there are Seventh Amendment limitations on Rule 56. Petitioners suggest that a line is drawn by the Seventh Amendment beyond which a trial court may not go in evaluating the facts in ruling on a motion for summary judgment. This Court is respectfully urged to grant review in this case to draw that bright line of demarcation that restricts the use of Rule 56.[6] This Court has not heretofore dealt with Rule 56 in the full context of the Seventh Amendment. In *Fidelity & Deposit Co. v. U.S.*, 187 U.S. 315 (1902), the Court held that a District of Columbia procedural rule providing for a form of summary judgment did not on its face violate the Seventh Amendment and that the opposing party had a burden to come forward. That outcome is similar to the

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[5]*Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Celotex Corp v. Cattrett*, 477 U.S. 317 (1986).

[6]This Court has issued a writ of certiorari in *American Airlines v. Lockwood* (docket No. 94-1660) which involves the question of the procedural right to trial by jury under the Seventh Amendment in patent cases. The case at bar presents the opportunity to addresss the substantive aspects of the Seventh Amendment.

holding in *Celotex*. We are not dealing however with procedure in this case, but substance. This case affords this Court an opportunity to define those substantive components of the Seventh Amendment. Here we are dealing with the interpretation of the evidence and application of summary judgment not whether the rule is *per se* unconstitutional.

1. Brief history of the Seventh Amendment

One of the cornerstones of Anglo-American jurisprudence is the right to have a jury decide one's case. This right existed at common law and embodied in the Seventh Amendment to the Constitution.

Congress included trial by jury in civil cases in the Northwest ordinance which was adopted two months before the Constitutional Convention. The failure of the constitutional convention to include the right to trial by jury in civil cases as a part of the original document nearly caused the defeat of ratification. In the *Federalist*, No. 83, Alexander Hamilton, arguing for ratification, vainly tried to explain its omission and the reasons supporting its exclusion. His arguments proved inadequate until a committment was made by the pro-Constitution forces to amend the new Constitution to add the Bill of Rights that included the right to trial by jury in the Seventh Amendment. *Parsons v. Bedford*, 3 Pet. 433 (1830).[7]

When James Madison introduced the constitutional

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[7] *See also Morris, Witness at the Creations*, pp 238 and 247 (1985).

resolution for a Bill of Rights in the First Congress in 1791 it stated:

> In suits at common law between man and man, the trial by jury as one of the best securities to the rights of the people, ought to remain inviolate.

Creating The Bill of Rights: the Documentary Record from the First Federal Congress 13 (Johns Hopkins Press 1991).

Similar language was submitted by the Virginia and Massachusetts Conventions. Id. at 15 and 18. While the word "inviolate" was not used in the final language, its use in the state conventions and the initial resolution reflect the strong intent that the right must not be subject to erosion. There was strong feeling among the colonists that the right to trial by jury in civil cases be preserved. This right should not be stripped away by a procedural rule.

This Court reaffirmed its strong commitment to the right in *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989), where it found unconstitutional a portion of Chapter 11 of the Bankruptcy Act of 1983. *Curtis v. Loether*, 415 U.S. 189 (1974) clearly outlined the entitlement of a party to the right to trial by jury. *See also Lytle v. Household Mfg.*, 494 U.S. 1331 (1990).

The history of the Seventh Amendment is discussed at length by Chief Justice Rehnquist in his dissent in *Parklane Hosiery v. Shore*, 439 U.S. 322, 338 (1979), where

he stated that "the right trial by jury in civil cases at common law is fundamental to our history and jurisprudence". *See also*, Mr. Justice Story's opinion in *Parsons v. Bedford, supra*. Most recently, in *Markman v. Westview Instrumentals, Inc.*, _ F.3d _, No. 92-1049), (Fed. Cir. Apr. 5, 1995), Judge Newman, in his dissent, also discussed the history of the amendment at length. Rather than restate that history petitioners refer the Court to those discussions.

2. Brief history of Rule 56.

In the Federal Rules of Civil Procedure adopted in 1938, a provision for summary judgment was included as Rule 56. The early application of Rule 56, however, was restricted by the federal appellate courts. See, e.g., *Dolgow v. Anderson*, 438 F.2d 825 (2d Cir. 1970); *Doehler Metal Furniture Co. v. United States*, 149 F.2d 130 (2d Cir 1945).

The Federal Rules of Civil Procedure were adopted pursuant to 28 U.S.C. § 2072, a procedure by which this Court adopts the rules in conjunction with Congress. Congress became involved in 1938 through 28 U.S.C. § 2072. As pointed out, however, in *Beacon Theaters v. Westover*, 359 U.S. 500, 510 n. 16 (1959), when Congress' delegated to the Supreme Court responsibility for drawing up the federal rules of civil procedure, it was Congress' expressed intent that the rules not infringe the Seventh Amendment. 28 U.S.C. § 2072 (1948). The language was changed in § 2072 in 1988 to remove the direction that the rules not impair the right to trial by jury guaranteed

by the Seventh Amendment. Whatever Congress' intent in removing the language, it could not impair that constitutional provision. The Supreme Court and Congress cannot amend the Constitution. Only Congress and the states can accomplish that task.

Under Rule 56 a trial court may only grant summary judgment if "there is no genuine issue as to any material fact and that the moving party is entitled to judgment is a matter of law." Under the rule, depositions, answers to interrogatories, admissions and affidavits may be used to pierce the allegations to determine whether any material facts are in dispute. Likewise, the evidence must be viewed in a light most favorable to the party opposing the motion. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S., 574, 587 (1986).

This rule, on its face, does not offend the Constitution. It is the application in this case that usurps the Seventh Amendment. The standard set forth in Rule 56 has been misused to broaden the scope of the trial courts inquiry to include weighing and balancing the evidence when it considers the substantive evidentiary requirement. That is what offends the Seventh Amendment. The Seventh Amendment is not only procedural but substantive in terms of the functions of the jury.

While this court warned against weighing the evidence in *Anderson v. Liberty Lobby, Inc. supra*, it has become commonplace, as exemplified by the case at bar. The analytical quagmire predicted by Mr. Justice Brennan

in his dissent in *Liberty Lobby* has become a reality. The trial courts today, however, have gone even further in making the factual determination by a preponderance of the evidence and issuing what amounts to findings of fact akin to what is required by Rule 52 of the F.R.C.P. In *Liberty Lobby* this Court stated:

> If the defendant in a run-of-the-mill civil case moves for summary judgment or for a directed verdict based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict - "whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed."

Liberty Lobby, 477 U.S. at 252 (quoting *Improvement Co. v. Muson*, 14 Wall, 442, 448 (1972).

The only way that summary judgment could be upheld in this case is by viewing only the evidence favorable to Allied. That scenario, however, shows the problem with Rule 56 as it is applied today by the lower courts. "Lip service" is paid to the restriction on the use of the rule to view the evidence in a light, most favorable to the opposing party but in practice, trial courts move ahead with deciding the case by a preponderance of the evidence. That practice is contrary to what this Court said in *Anderson v. Liberty Lobby, Inc., supra* at 252. The only way to end such practice is to clarify and sharply delineate how the trial court is to consider the evidence. In his dissent in *Liberty Lobby* at p. 258, Mr. Justice Brennan raised the question that is being raised here: How are evidentiary standards to be considered "or what a trial judge is supposed to do in ruling on a motion for summary judgment." He went on to state that the case sent conflicting signals to the trial courts:

> I simply cannot square the direction that the judge "is not himself to weigh the evidence: with the direction that the judge also bear in mind the "quantum" of proof required and consider whether the evidence is of sufficient "caliber or quantity" to meet that "quantum." I would have thought that a determination of the "caliber and quantity," i.e., the importance and value, of the evidence in light of the "quantum," i.e., amount "required," could only be performed by weighing the evidence.

Liberty Lobby, 477 U.S. at 266. The Seventh Amendment is never mentioned in the case but its presence hovers over the analysis.

Continuing appellate review on an *ad hoc* basis will permit the federal trial courts to virtually eliminate trial by jury and emasculate the Seventh Amendment. A clarification by this Court is needed.

Petitioners suggest that when the trial court, in considering a motion for summary judgment, determines the case by a preponderance of the evidence, it has violated the Seventh Amendment. The decision to allow a case to go to a jury is guided by the substantive evidence standards that apply, *Anderson v. Liberty Lobby*, 477 U.S. at 255, it is one thing for the court to determine if a case could meet its evidentiary burden. It is completely different and unconstitutional matter for the court to decide for itself which side had produced the most plausible story. It should only decide whether the party opposing the motion has presented a plausible story. They are different tests. Juries are instructed that the party with the burden of proof must prove his case by a preponderance of the evidence.[8] That means weighing all the evidence. [9] It means the evidence taken as whole, and not that each evidentiary fact must be proven by a

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[8]*Costner v. Blount-Nat'l Bank*, 578 F.2d 1192 (6th Cir. 1978).

[9]*Gradsky v. Sperry Rand Corp.*, 489 F.2d 502 (6th Cir. 1973)

preponderance.[10] In the case at bar, the trial court determined the case by a preponderance of the evidence. Petitioners submit that was error and violated the Seventh Amendment.

The dissenting opinions of Chief Justice Rehnquist in *Parklane Hosiery v. Lane*, 439 U.S. 322, 338 (1979) and Mr. Justice Brennan in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986), viewed against the facts in the case at bar, compel the grant of review to clarify the standards to be applied by the trial judge in assessing the quantum of proof and whether that assessment is restricted by the Seventh Amendment.

3. Violation of the Seventh Amendment in the case at bar.

A. Statute of Limitations - Disputed Facts

Petitioners submit that in granting summary judgment in the case at bar as to the claims for breach of contract, tortious interference and breach of fiduciary relations the district court violated the Seventh Amendment.

The District Court granted summary judgment on those three counts based purely on its calculation of the

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[10] *Ohio-Sealy Mattress Mfg. v. Sealy, Inc.*, 585 F.2d 821 (7th Cir. 1978).

running of the statute of limitations. Section 12-301 of the District of Columbia Code sets a three-year statute of limitation for contract actions and actions, like breach of fiduciary duty and tortious interference with a business relationship, for which no other limitation period is prescribed.[11] By granting summary judgment, the District Court chose one of several possible dates for when the cause of action arose. In doing so the Court weighed the conflicting evidentiary theories as to which was the appropriate date. Petitioners filed their complaint on August 1, 1990, and argued that the three-year statute of limitations did not run until August 4, 1990, because that was when the deal closed for the 68 centers, the stock was issued to the shareholders of PC and the breach of contract occurred. Respondent argued that the statute of limitations ran on April 23, 1990, because the investment agreement was signed on April 23, 1987 and PC was formed in April, 1987. The choice of the applicable date was for a jury and not the Court.[12]

The District Court held that the statute of limitations began to run in April of 1987 because it erroneously assumed that the stock for PC was issued in April, 1987. The stock certificates themselves (App. pp. 1151-1168) show this was not true. The stock certificates are dated August 4, 1987, and January 5 and 11, 1988.

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[11]D.C. Code §§ 12-301(7)-(8) (1989).

[12]The D.C. Circuit has held that, where there is a dispute of facts as to when the cause of action arose, summary judgment is inappropriate. *Goldman v. Bequai*, 19 F. 3rd 666 (D.C. Cir. 1994).

Further, the 40% warrants were not issued to Humana until August 4, 1987; Gladstone affirmed the obligation to PMI shareholders on October 30, 1987; and a recapitalization took place on November 17, 1987, culminating in the stock issuance in January, 1988. The earliest stock certificates issued to Allied are dated August 4, 1987.

The District Court's finding is mistaken where it stated:

> Allied breached this contract in April when Ellsworth and Old established the capital structure of PC, issuing ninety percent of the stock to Allied's group and splitting the remaining ten percent between themselves. The defect in this claim is also fairly obvious, for the complaint itself states that Allied's wrongful conduct was completed by April 3, 1987. Because "an action for breach of contract runs from the time of the breach . . . . (A-13)

These findings of fact are based upon facts in dispute which would preclude the granting of summary judgment. The petitioners evidence shows that the capital structure was not set in April 1987 and no stock was issued at that time. (App. pp. 1151-1221) In fact, the capital structure was not set until January 1988, when final shares were issued. The capital structure changed several times between April 1987, and January 1988. The issuance of shares initially took place on August 4, 1987,

which is the first date, that a breach could have occurred. On that date the issuance of the 40% warrant to Humana also changed the capital structure. The first revision to the 30% agreement for PMI investors took place on September 21, 1987, when Gladstone sent a letter to PC setting a valuation that would give the PMI investors only 5% of the stock. (App. pp. 1204-1206) It was still a confirmation of the original commitment to PMI investors. Furthermore, Delaware law states that stock shall not be issued until money is paid, labor is done, or property or leases are actually acquired. *Delaware Constitution of 1897*, Article IX § 3. PC was organized as a Delaware corporation, and thus Delaware law will prescribe how PC must act in issuing stock. Since the Delaware Constitution mandates that stock cannot be issued until something is put into a newly formed corporation, PC could not lawfully issue its stock until it acquired assets. *See Diamond State Brewery v. De La Rigandiere*, 17 A.2d 313 (Del. Ch. 1941) and *In re Seminole Oil & Gas Corp.*, 150 A.2d 20 (Del. Ch. 1959). In this case, PC did not acquire the health care facilities until August 4, 1987, when the sale closed. Thus, the petitioners' opportunity was not usurped by PC and Allied until PC could be formed and shares issued, which was on August 4, 1987 at the earliest.

There are numerous errors of fact in the District Court's opinion. There is the error on the issuance of stock; the expiration of the letter of intent; the ownership of PC before the stock was issued; and PMI raising the necessary capital for financing. The district court also found that a closing of eleven of the centers that took place on April 23, 1987, was an act of injury (A-11) that

started the time running but ignores the evidence of ownership of PC on that date. At best these are disputes of material fact and at worse clearly erroneous findings of fact by the district court. The Court of Appeals simply ignored these errors, or out of excessive deference to the district court, adopted them as its own. If the Court of Appeals does not conduct a meaningful review, then Rule 56 becomes discretionary with the district court. The result of granting such discretion would destroy the right to trial by jury.

The issue in this case should be whether a jury could find, by a preponderance of the evidence, that the cause of action arose when the stock was issued on August 4, 1987. *Anderson v. Liberty Lobby, Inc., supra* at 252. The depositions, affidavits, and documents filed by the petitioners would support such a finding. That is sufficient to entitle petitioner to a jury trial. The District Court in this case ignored Plaintiffs' evidence while believing the line of reasoning set forth by Allied. By giving greater weight to some and ignoring other evidence, the judge performed the function of the jury in deciding when the cause of action arose. This Court said in *Liberty Lobby* at 248 that summary judgment will not lie "if the evidence is such that a reasonable jury could return a verdict for the non-moving party."

The Court of Appeals in its deference to the district court missed the principal issue and decided the case on a tangential issue of concealment. The principal issue on appeal was whether the cause of action arose in April, 1987 or August 4, 1987. The August 4, 1987, date

was not predicated on concealment as tolling the statute of limitations. The investors filed their case on August 1, 1990, within the three year period. At issue is when the ownership of PC was set for purposes of the breach and the wrong. Allied contends it was the April 23, 1987 investment agreement and the investors contend that it was when the stock was issued on August 4, 1987. No stock was issued before August 4, 1987. The selection of the date was for the jury not the judge. Petitioners made a *prima facie* case that the cause of action arose on August 4, 1987 that precluded summary judgment.

The District Court viewed the evidence in a light most favorable to Allied (the April 23, 1987 agreement) and disregarded the petitioners evidence (the stock issuance on August 4, 1987). The District Court, and the Court of Appeals by adoption of its findings, held that the cause of action arose in April, 1987. because the investment agreement set the ownership. *That is incorrect.* No stock was issued in April. It was not issued until August 4, 1987 (App. p. 1163).

A jury could find that PC was not owned by Allied and the others until August 4, 1987. Prior to that date, PC was owned entirely by PMI since PMI money was used to organize it and pay for the negotiations with Humana, Inc. for sale of the health clinics. (Old Affidavit, App. p. 1123). If PMI paid for formation of PC, it was the owner until August 4, 1987.

The investment agreement relied upon by the Court of Appeals, *does not* finalize the ownership (App.

p. 1276). The issuance of the warrants to Humana on August 4, 1987 changed the ownership structure (App. p. 1193) by giving Humana 40% of the equity on default and required an amendment to the April 23, 1987 agreement; (App. p. 1636) and no stock was issued until August 4. The April 23 agreement is merely a proposal that set out a formula for ownership to take place at the closing. The August 4 closing changed the formula. That change coupled with the date that stock was issued meant that ownership was not set in April. The facts surrounding the capital formation were in dispute. A jury was entitled to hear testimony and thus determine when the capital formation was complete.

The district court also made a finding, without evidentiary support, that Allied was the only source for financing the purchase (A-9). That finding is undercut by the fact that no effort was made to obtain further investment from the stockholders or limited partners to finance this purchase. In fact they were never given the opportunity and knew nothing about it. The money that had invested the year before by them was used but only for the benefit of Allied and the others in PC to the exclusion of the PMI investors. The facts in this case are similar to those in *McCandless v. Furland*, 296 U.S. 140 (1935).

Petitioners clearly filed their complaint on August 1, 1990, within the statute of limitations of three years, because the earliest the cause of action arose was August 4, 1987. Therefore, the statute did not run until August 4, 1990. The Court of Appeals misunderstood the facts in

this case. There was no waiver on this issue nor did the District Court say that there was. The Court said nothing on the issue of waiver of concealment.[13] Instead the Court of Appeals, without saying when the cause of action arose, April or August (a jury question), said there was waiver on the concealment theory. But that was not dispositive. Petitioners did not rely upon a concealment theory for the August 4, 1987 date for the cause of action arising.

B. The Conversion Theory.

The Court of Appeals also affirmed the District Court grant of summary judgment as to Count XI of the amended complaint for conversion, holding that PMI did not own PC so that there was no conversion of property that it had never held.

That finding of fact was strongly disputed by petitioner's evidence. A reasonable jury could find that PMI was the owner of this corporation from its formation on April 3, 1987 until August 4, 1987 when the stock was issued to Allied. PC was (1) formed by officers of PMI;

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[13]The statute of limitations should not even be an issue in this case. Allied filed its Answer to Plaintiffs' amended complaint on October 13, 1992. In its original answer, Allied did not raise the statute of limitations as an affirmative defense. Rule 8(c) of the Federal Rules of Civil Procedure requires defendants to set forth the statute of limitations as an affirmative defense. The District court erroneously, however, granted Allied leave to amend to add the defense.

(2) using PMI money, time and assets; (3) using PMI's name; and (4) as a subsidiary of PMI. PC was incorporated under Delaware law. Under Delaware law it was owned by PMI until August 4, 1987. One of the incorporators, Luciano, viewed PC as an extension of PMI (App. 735-736), so that a jury could find that it was a subsidiary of PMI. Because of the control exercised by Allied over the management of PMI, Allied was able to deliver the ownership of PC to itself on August 4, 1987, and out of the hands of PMI investors. This is sufficient evidence, viewed in a light most favorable to petitioner as required by Rule 56, to make a *prima facie* case of conversion. The factual issue of who owned PC from its creation in April, 1987 to August 4, 1987, was for the jury to determine and not the Court. Only by viewing the evidence in a light most favorable to Allied could the Court of Appeals make the finding that it did what was clearly contrary to Rule 56 and the Seventh Amendment.

The Court of Appeals went on to hold that there was no evidence of co-mingling of the assets of PC & PMI in spite of a finding by the district judge that Old and Ellsworth operated PMI and PC as "if the two corporations were the same company" (A7-8). A jury however could find from the evidence that PMI and PC had been co-mingled as one entity under Allied's control and then placed by Allied under the control of HealthStop. If the evidence is viewed in a light most favorable to petitioners, there was co-mingling of not just accounts but management. PMI and PC were managed as one entity with Allied controlling that entity.

The facts produced were sufficient to meet the substantive law requirements of conversion.[14] The Court of Appeals declined to decide whether an intangible is subject to conversion even though that is the trend in the United States.

The issue raised in this case is how far may the federal courts go in assessing the evidence on summary judgment before they violate the Seventh Amendment. The application of Rule 56 by the federal courts has become like a runaway horse that must be corralled. This case presents this Court with the opportunity to address this problem and curtail the wide discretion which the Courts of Appeal are giving the district courts under Rule 56 - a discretion that is destroying the right to trial by jury. If this Court does not curtail this trend, trial by jury in civil cases will eventually become extinct and the Seventh Amendment rendered meaningless. In this case petitioners had a right to a jury trial of their claims which was arbitrarily denied them by the trial court.

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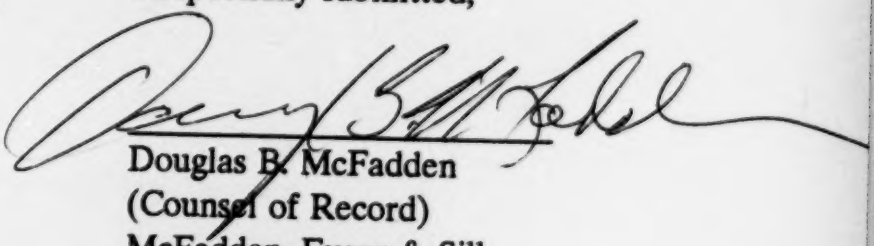
[14]*Watts v. Miles*, 597 S.W.2d 386 (Tex. App. 1980); *Kalb v. Vega*, 468 A.2d 676 (Md. App. 1983); *Inglesias v. U.S.*, 848 F.2d 362 (2nd Cir. 1988); *Reading Finance v. Harley*, 186 F. 673 (3rd Cir. 1911); and *Restatement of Torts 2d*, § 242(2) p. 474.

CONCLUSION

WHEREFORE, petitioners, for the foregoing reasons, pray this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,



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APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PRIMEDICAL, INC., et al.,	) Civil Action
	) No. 90-1802
Plaintiffs,	) (NHJ)
	)
v.	)Filed
	)March 31, 1994
ALLIED INVESTMENT CORP.	)CLERK, U.S.
	)DISTRICT COURT
Defendants.	)DISTRICT OF
	)COLUMBIA

MEMORANDUM OPINION

Plaintiffs in this action are Primedical Incorporated ("PI"), an owner and operator of ambulatory health care facilities, and several corporate and individual investors who allege interests in PI. On September 25, 1992, the Court granted defendant's motion to dismiss several counts of the third amended complaint. This case is now before the Court on defendant's motion for summary judgment with respect to the remaining counts, Count III (breach of fiduciary duty), County VI (tortious interference with business relationship), Count X (breach of contract,), and Count XI (conversion).

FACTS

The following facts are undisputed. In 1986 PI became interested in purchasing a large number of health

clinics from Humana, Inc. On March 23, 1987, Humana and PI signed a nonbinding [1] "letter of intent" in which Humana agreed to sell sixty-eight clinics in eight metropolitan areas to PI for $37.5 million. The letter of intent contemplated that the parties would negotiate and execute "definitive agreements" no later than April 3, 1987, and provided that the letter would expire by its own terms on that date if such agreements were not executed. On March 30, 1987, defendant Allied sent a proposed financing agreement to PI's officers, Stanford Ellsworth and Randolph Old, in which Allied agreed to provide $3 million to "a new company to be formed" in return for certain interests in the new company's assets and securities. The proposed agreement provided that Allied's obligations would become effective only if certain conditions were fulfilled, and among these conditions was the requirement that Ellsworth and Old obtain a commitment from a financial institution to provide lease financing of $10 million on terms acceptable to Allied. The proposed agreement also contemplated a capital structure in which Ellsworth and Old would each own five percent of the new company's stock, Allied and its group of investors would own sixty percent, and the shareholders of PI who exchanged their PI shares for stock in the new company would own thirty percent.

The deal between PI and Humana was never

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[1] In its opinion of September 25, 1992, the Court determined that the letter of intent did not bind the parties and therefore was not a contract. See Opinion of Sept. 25, 1992, at 8-9.

consummated, and the letter of intent expired on April 3, 1987. Immediately thereafter, Ellsworth and Old organized a new company, Primedical Corporation ("PC"). Ellsworth and Old established the capital structure of PC upon its formation, issuing ninety percent of the stock to Allied and its group of investors and taking five percent apiece for themselves. Ellsworth and Old, acting on behalf of PC, signed the financing agreement with Allied on April 10, 1987. Despite their efforts to obtain financing, however, Ellsworth and Old were unable to meet the condition of the agreement requiring that they obtain a commitment from a financial institution to lend them $10 million. On April 23, therefore, PC (acting through Ellsworth and Old) signed another investment agreement with Allied that terminated the first agreement and contained different terms. The second agreement contained no reference to the capital structure described in the first agreement, under which PI investors would be able to receive thirty percent of the PC stock. Instead, the second agreement recognized that Allied and its group of investors had received shares that gave them a ninety percent ownership interest in PC. See Ex. A to Investment Agreement of Apr. 23, 1987.

In the meantime, on April 7 Humana and PC signed an "agreement of sale" providing for the sale to PC of the same sixty-eight clinics that had been the subject of the March 23 letter of intent. The first closing under this agreement, which involved the transfer of eleven clinics from Humana, occurred on April 23. The second closing, which involved the remaining clinics, took place on August 4. PC soon defaulted on its obligation to make payments

to Humana, and after other developments Allied and its group of investors eventually sold their interests in PC to a Massachusetts corporation.

Plaintiffs filed their complaint on August 1, 1990, alleging that Allied had harmed them by usurping PI's opportunity to purchase the Humana clinics. Plaintiffs argue that although Allied and its officers held no formal positions as officers or board members of PI, Allied nevertheless exercised considerable control over PI because Allied had invested substantially in PI. Plaintiffs claim that Ellsworth and Old created PC at Allied's insistence, and that Allied then used PC as a means of excluding PI shareholders from the Humana deal. Plaintiffs also claim that Allied breached its contract with PI by failing to provide PI shareholders with the opportunity to exchange their shares for thirty percent of PC's stock. Finally, plaintiffs claim that Allied is liable for conversion because PC took control of PI's assets and property at Allied's instigation.

DISCUSSION

A. The Statute of Limitations Bars Plaintiffs' Claim for Tortious Interference with Business Relationship and Breach of Fiduciary Duty

When a plaintiff seeks to recover for tortious injury, "it is generally held that a cause of action will accrue and start the limitation period running, when the elements of a tortious act by defendant and a legal injury to plaintiff coalesce." Perkins v. Nash, 697 F. Supp. 527,

532 (D.D.C. 1988) (citing 1 Stuart M. Speiser et al., The American Law of Torts § 5.:27, at 881 (1983)). Thus, "[t]he cause of action is said to have accrued when the last of all the elements of a tort necessary for the successful maintenance of an action occurs, only when forces wrongfully put in motion produce injury." 1 Speiser et al., supra, § 5.27, at 881.

The parties agree that plaintiffs' causes of action for breach of fiduciary duty and for tortious interference with business relations are governed by the three-year limitations period set forth in D.C. Code Ann. § 12-301(8) (1989). The parties disagree, however, with respect to the question of when plaintiffs' causes of action accrued. Defendant argues that the statute of limitations began to run in April 1987 because PI irrevocably lost its opportunity to acquire the Humana centers in that month. Plaintiffs argue that the statute began to run on August 4, 1987, the date of the second closing between PC and Humana, because "[i]t was at that moment that plaintiffs were damaged" and "until the moment of the closing the defendant could have prevented the injury." Because plaintiffs filed their complaint on August 1, 1990, barely less than three years after the second closing, the question of when plaintiffs suffered injury is potentially dispositive of their claims.

The essence of the tort of tortious interference with prospective business relations is "the use of `intentional and improper methods of diverting or taking business from another which are not within the privilege of fair competition.'" 9 Speiser et al., supra, § 31:74, at 9.

To establish such a claim under District of Columbia law, a plaintiff "must show that the defendant intentionally interfered with business opportunities that were 'commercially reasonable to anticipate.'" Whelan v. Abell, 953 F.2d 663, 673 (D.C. Cir. 1992) (quoting Carr v. Brown, 395 A.2d 79, 84 (D.C. 1978)). Plaintiffs bear the burden of showing that the alleged business opportunities were indeed likely to materialize. See 9 Speiser et al., supra, § 31.74, at 12 ("[P]laintiff must demonstrate that, absent such interference, business relations were reasonably likely to develop in fact.") (citing Carr, 395 A.2d at 84).[2]

Plaintiffs are thus mistaken in their claim that they cold not have suffered injury until the second closing. Regardless of whether "defendant could have prevented the injury" up until the moment that title to the clinics actually passed from Humana to PC, the tort of which plaintiffs complaint was not completed when development of business relations became impossible, but when it was no longer reasonably likely. To determine when the statute of limitations began to run, therefore, the Court must locate the point in time when PI could no longer reasonably have expected to acquire the Humana clinics. PI could conceivable have reached this point before or

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[2]Because plaintiffs' breach of fiduciary duty claim is based upon the alleged diversion of PI's busines opportunity to acquire the Humana centers, the Court will treat it as identical to the plaintiffs' tortious interference claim in this discussion. Although the elements of the two torts are different, the injury alleged here is precisely the same, and the critical question in the current inquiry is whether that injury occurred before or after August 1, 1987.

after the passage of title from Humana to PC.

The record evidence indicates that PI lost all reasonable expectation of acquiring the Humana clinics in April 1987. As explained above, plaintiffs bear the burden of demonstrating that the opportunity to acquire the clinics was likely to materialize. The most significant evidence plaintiffs have presented on this point is the March 23, 1987, letter of intent between PI and Humana, which expired by its own terms on April 3. Although PI's business opportunity might conceivably have persisted beyond this date, plaintiffs have presented no evidence that it did. Rather, the evidence seems to indicate that PI's opportunity to purchase the clinics may have disappeared even earlier.

The record shows that Ellsworth and Old, who were the officers of both PC and PI, operated almost as if the two corporations were the same company. PC was created "in order to make the investment [in the Humana deal] clean to new investors," Dep. of Randolph Old at 40, and wa operated under the assumption "that Primedical Inc. was going to become part of Primedical Corp.'" id. at 9. The distinction between the two companies apparently was not very clear. See id. at 54 ("it was a very blurry time with these two companies coming together"); see also Dep. of Daniel Luciano at 41 ("to my mind, the relationship of Inc. and Corp. were almost identical"). Because PC was created primarily for the purpose of concluding the Humana deal, therefore, Old and Ellsworth had no incentive to continue to seek financing on behalf of PI after PC was formed.

PI could not have purchased the Humana clinics without obtaining such financing. Amply evidence in the record indicates that PI would have needed to assemble $37.5 million in cash before completing the deal with Humana, and that it intended to rely upon financing from others (including Allied) in order to obtain these funds. See, e.g., Dep. of Stanford Ellsworth at 73, 78; Dep. of Randolph Old at 89-90. However, on March 30, 1987, Allied sent a proposed financing agreement to Ellsworth and Old in which Allied agreed to provide $3 million in financing not to PI, but to "a new company to be formed" -- in other words, to PC -- which Old and Ellsworth created the following week. Allied's proposed agreement also contemplated that the "new company" would obtain $34 million in financing from other sources. Some $24 million of this was to have come from a "sale-leaseback" arrangement with Gary Pyles. See Def.'s Ex. 10 at 8; Dep. of Stanford Ellsworth at 68, 93. Old and Ellsworth could not have completed the Humana deal without the involvement of Allied and Pyles. See id. at 73. Plaintiffs have not shown that Allied and Pyles were still willing to provide financing to PI. Nor have they shown that PI could have obtained financing from other sources, or that PI's officers were actively engaged in seeking such financing. Instead, the record demonstrates that by early April Ellsworth and Old had decided to finance the deal between PC and Humana with money from the very same entities upon which PI had earlier hoped to rely.

Because PI could not have purchased the clinics without financing, PI's business opportunity ceased to be

"reasonably likely to develop" when its prospects of obtaining financing evaporated. Although the record does not show precisely when this occurred, it had probably already taken place in late March when Allied prepared the proposed financing agreement. By then both Ellsworth and Old had agreed with Allied that a new corporation should be formed to acquire the clinics, and they had apparently decided that the corporation would rely on Allied and Pyles for financing. At the latest, PI certainly lost its opportunity to obtain financing on April 10, 1987, when Ellsworth and Old -- acting on behalf of PC, not PI -- signed the financing agreement with Allied.

If this event did not terminate any reasonable prospect that PI might acquire the clinics, then PC's contract with Humana, signed on April 23, 1987 surely did. After the contract was executed PC became the equitable owner of the real estate and leases listed in the sales agreement -- of the ground on which the clinics stood, so to speak -- and PC could have secured specific performance of the contract even if Humana had sought to withdraw. See 11 Samuel Williston & Walter H.E. Jaeger, A Treatise on the Law of Contracts § 1418A, at 664 (3d ed. 1968) ("a contract to convey land is specifically enforceable by the purchaser"); see also id. at 677 (contract to convey leasehold is specifically enforceable). Plaintiffs can hardly argued that PC might have decided to cancel the deal at this point, in view of their repeated claims that Allied had virtually complete control over PC and was using it as a puppet to benefit itself. By April 23, 1987, therefore, PI no longer had any reasonable prospect of acquiring the Humana clinics and had suffered the

injury of which plaintiffs complaint. Allied's allegedly tortious conduct was complete, and the statute of limitations began to run. Because plaintiffs did not file their complaint until August 1, 1990, more than three years later, their claims are barred.

Because plaintiffs place such great weight on the fact that the closing did not take place until August 4, 1987, however, it is worthwhile to consider the limitations question from another perspective. If the Court were to assume, arguendo, that plaintiffs suffered no injury until title to the clinics actually passed, then the Court would nevertheless reject plaintiffs' argument because it ignores the closing that occurred on April 23. Although the parties closed on most of the sixty-eight clinics on August 4, Humana transferred eleven of the clinics to PC on April 23. See Ex. 45 to Pls.' Opp'n at 1; Ex. 54 to Pls.' Opp'n at 6. Plaintiffs do not argue that the closing on August 4 amounted to an independent act of wrongdoing; rather they merely claim that "[i]t was at that moment that plaintiffs were damaged." By plaintiffs' own reasoning, however, PI suffered substantial injury on April 23 as well, even if the injury flowing from Allied's alleged torts was not complete until August 4.

For a statute of limitations to begin to run, "[i]t is clear that plaintiff need not have suffered all injury to which he will ultimately fall prey." Perkins, 697 F. Supp. at 532 (citing Fitzgerald v. Seamans, 553 F.2d 220, 227 (D.C. Cir. 1977)). Rather, the clock begins ticking when "the fact of injury [is] sufficiently plain for [plaintiffs'] cause of action to accrue even though the extent and

precise nature of the injury [has] not yet developed." Fitzgerald, 553 F.2d at 227. The transfer of eleven clinics on April 23, at a time when Allied had completed all the elements of the alleged torts, rendered PI's injury "sufficiently plain" and made the torts actionable even though PI would still suffer additional injury in August. The statute of limitations therefore began to run in April, not August. Thus, even if the Court accepts plaintiffs' argument that injury did not occur until title to the clinics actually passed to PC, plaintiffs still suffered sufficient injury in April 1987 to bar their claims today.

B. The Statute of Limitations Bars Plaintiffs' Claim for Breach of Contract

Plaintiffs' breach of contract claims reads as follows:

> 111. On or about March 20, 1987 Allied, Venture and the management of [PI] entered into an agreement which facilitated the creation of PC, for the purpose of acquiring the aforementioned Humana Medfirst facilities. Allied, Venture and PC agreed with [PI] that the individual plaintiff shareholders in [PI] would receive, collectively, a 30% ownership interest . . . in PC.
>
> 112. On or about April 3, 1987, PC was formed. Defendants Allied and Venture were one investor in a group who acquired 90% of

> PC. In contravention to the aforementioned agreement, no opportunity was accorded the individual plaintiff shareholders in [PI] to participate in the ownership of PC.
>
> 113. As a direct and proximate result of the breach of contract by Allied, Venture and PC, plaintiffs have been damaged in the sum of sixty million dollars ($60 million).

Third Am. Compl. at 30-31. These allegations are thus fairly straightforward: plaintiffs claim that the proposed financing agreement of March 1987 constituted a contract in which PC and Allied agreed to provide PI shareholders with a thirty percent interest in PC, and that Allied breached this contract in April when Ellsworth and Old established the capital structure of PC, issuing ninety percent of the stock to Allied's group and splitting the remaining ten percent between themselves. The defect in this claim is also fairly obvious, for the complaint itself states that Allied's wrongful conduct was completed by April 3, 1987. Because "an action for breach of contract runs from the time of the breach," Computer Data Sys., Inc. v. Kleinberg, 759 F. Supp 10, 15 (D.D.C. 1990), and because actions for breach of contract are governed by a three-year statute of limitations, see D.C. Code Ann. § 12-301(7)(1989), the limitations period on this claim had already expired when plaintiffs filed their complaint on August 1, 1990.

In their opposition to defendant's motion for

summary judgment, plaintiffs claim that Allied "entered into an oral contract to include the plaintiffs in the corporate life of the Humana purchase."[3] Although plaintiffs do not expressly argue that the existence of this oral contract defeats defendant's statute of limitations argument, some evidence in the record might seem, at first glance, to breathe new life into plaintiffs' breach of contract claim. Specifically, deposition testimony shows that when Old, Ellsworth, and others complained to David Gladstone, Allied's President, about the failure to allocate a thirty percent share in PC to PI shareholders, Gladstone said, "we'll fix it later." Dep. of Daniel Luciano at 66; see also Dep. of Randolph Old at 73. Although the record does not indicate exactly when Gladstone made these statements, he certainly made them after the second financing agreement was prepared. See Dep. of Daniel Luciano at 66-68. The possibility exists, therefore, that Gladstone made some of his promises to "fix" the problem after August 1, 1987, and that plaintiffs' breach of contract claim might be timely because Gladstone failed to keep these promises. See, e.g., Pls.' Ex. 45 (draft letter from Gladstone, dated May 21, 1987, stating that PI "will be merged into [PC] by September 30, 1987").

The problem with this theory is that nothing in the record indicates that any of Gladstone's promises created a new contract. Plaintiffs have already alleged in their

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[3]Although the complaint does not allege existence of an oral contract, the parties have briefed the issue and the Court must therefore address it as if it were an amendment to the complaint. See Kulkarni v. Alexander, 662 F.2d 758, 762-73 (D.C. Cir. 1978) (citing Fed. R. Civ. P. 15(b).

complaint that the March 1987 financing agreement obligated Allied to provide PI shareholders with a thirty percent interest in PC. This agreement was breached in April, when the capital structure of PC was fixed and the PI shareholders received nothing. Even if Gladstone later promised to provide PI shareholders with their thirty percent, therefore, he was merely promising to do something which the March agreement already obligated him to do. His promises did not create contracts, because "where a party does or promises to do what he is legally obligated to do . . . he has not incurred detriment" and his promise is not supported by consideration. John D. Calamari & Joseph M. Perillo, The Law of Contracts § 4-9, at 204 (3d ed. 1987). Nor have plaintiffs argued that Gladstone's promises were supported by some substitute for consideration, such as detrimental reliance. Plaintiffs' cause of action therefore accrued when Allied allegedly breached the written contract, not when Gladstone promised "to fix it later." Plaintiffs cannot argue that Gladstone's gratuitous promises, made after the capital structure of PC was established, somehow rejuvenated the original contract and re-set the limitations clock. The PI investors were shut out of PC in April, the alleged breach occurred in April, and plaintiffs' claim became actionable in April. Plaintiffs' filing in August 1990, more than three years afterwards, was simply to late.

C. Plaintiffs Have Failed to Substantiate Their Conversion Claim

Finally, plaintiffs claim that Allied, operating through PC, converted PI's assets and used them for its

own benefit. This count of the complaint alleges:

> During and after the time PC was formed, corporate assets of [PI] were commingled with the corporate accounts of PC, were used for the exclusive benefit of Allied, Venture and PC, and were diverted from their intended uses.

Third Am. Comp. at 31. The elements of conversion are "(1) an unlawful exercise, (2) of ownership, dominion, or control, (3) of the personal property of another, (4) in denial or repudiation of that person's rights thereto." O'Callaghan v. District of Columbia, 741 F. Supp. 273, 279 (D.D.C. 1990) (citing Duggan v. Keto, 554 A.2d 1126, 1137 (D.C. 1989).

Nothing in the record supports plaintiffs' claims that PC or Allied converted property belonging to PI. As plaintiffs explained in their responses to defendant's requests for admissions, most of the "corporate assets" for which plaintiffs seek to recover were intangible:

> Obviously, there was something to this thing called Primedical, its name, its people, and the respect that the industry has for its stature as a company. There was a management team, a design for each center, method of operation, staffing techniques, equipment and supply schedules, accounting and billing procedures to name a few. These were developed over time, often by trial and error, using investors' money. These management assets, and the company's name, were used by [PC]. Also, the

> asset, the obligation of Humana to sell th eir centers to [PI], was an obligation which was taken over by [PC] without completing the transaction of merging [with PI].

Pls.' Responses to Def.'s Interrogs., quoted in Ex. 1 to Def.'s Mot. for Summ. J. at 1. The record evidence also suggests that PC may have benefited indirectly from some expenditures made by PI, and that PC did not reimburse PI for these expenditures. See Dep. of Randolph Old at 53-54. None of these allegations can support a claim for conversion, however, because "[t]raditionally, intangible property interests have not been subject to conversion." The Equity Group, Ltd. v. Painewebber Inc., 839 F. Supp. 930, 933 (D.D.C. 1993). Some courts have loosened this restriction and have permitted suits for conversion of intangibles, but "[t]he process of expansion has stopped with the kind of intangible rights which are customarily merged in, or identified with some document." W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 15, at 92. (5th ed. 1984). Thus a plaintiff may bring a suit for conversion of a promissory note, a check, a bank book, or an insurance policy, see id. at 91, but not for conversion of a debt, the good will of a business, or an idea, see id. at 92. Although the District of Columbia Court of Appeals does not appear to have ruled on the issue, at least one federal decision in this district has held that under District of Columbia law the tort of conversion does not permit recovery for intangibles such as businesses or business relationships. See The Equity Group, Ltd, 839 F. Supp. at 933. The Court agrees with the rationale of this decision. The Court therefore holds that plaintiffs

cannot sue for conversion of such intangibles as management expertise, respect in the business community, business opportunity, or uncompensated incidental "benefits."

The only cognizable portion of plaintiffs' conversion claim, therefore, is their assertion that PC appropriated "an assortment of fixed assets in the way of computers, chairs, desks, and filing cabinets" and that certain unspecified other assets were "commingled, damaged, or taken" by PC. Pls.' Responses to Def.'s Interrogs., quoted in Ex. 1 to Def.'s Mot. for Summ. J. at 2. Plaintiffs have failed, however, to come forward with any evidence that PC exercised "ownership, dominion, or control" over any such property. Deposition testimony clearly shows that PC and PI maintained separate bank accounts and that their funds were not commingled. See Dep. of Randolph Old at 55. Nor have plaintiffs pointed to any evidence in the record that PC ever used a single chair, desk, computer, or other chattel belonging to PI. Indeed, the only indication in the record that PC might have appropriated such property is plaintiffs' own response to defendant's request for admissions, a response that consists of nothing but conclusory assertions and which completely fails to identify the precise nature of the property taken. Rule 56 places a burden on the nonmoving party to "go beyond the pleadings and by [its] own affidavits, or by the `depositions, answers to interrogatories, and admissions on file,' designate `specific facts showing that there is a genuine issue for trial.'" Celotex Corp. v. Catreet, 477 U.S. 317, 324 (1986). By failing to identify the allegedly converted property with

sufficient specificity, plaintiffs have failed to meet this burden.

Furthermore, even if plaintiffs had come forward with such evidence, they would still have failed to show that PC's use of such property was "in denial or repudiation of [PI's] rights thereto" and therefore amounted to a conversion. Ample evidence in the record indicates that Ellsworth and Old operated PC and PI as if they were the same company. The alleged conversion therefore seems to have been entirely consensual. For example: if Ellsworth or Old, acting as officers of PC, ever sat at a desk owned by PI, they would not necessarily have been "denying or repudiating" PI's rights in the desk, especially because either of them might have sat at the same desk later in the day in his capacity as an officer of PI. Put simply, PI seems to have quite willingly permitted PC to share its office space. PC therefore cannot be liable for conversion, because "no one suffers a legal wrong as the result of an act to which, unaffected by fraud, mistake or duress, he freely consents or to which he manifests apparent consent." Restatement (Second) of Torts § 892A cmt. a (1977).

4. Conclusion

The statute of limitations bars three of plaintiffs' remaining four claims, and the fourth is entirely unsupported by the record. Defendant's motion for summary judgment will therefore be granted and this case will be dismissed. An appropriate order will issue.

/s/ NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE

Date: March 30, 1994

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PRIMEDICAL, INC., et al.,	) Civil Action
	) No. 90-1802
Plaintiffs,	) (NHJ)
	)
v.	)Filed
	)March 31, 1994
ALLIED INVESTMENT CORP.	)CLERK, U.S.
	)DISTRICT COURT
Defendants.	)DISTRICT OF
	)COLUMBIA

ORDER

For the reasons set forth in the memorandum opinion issued today, it is this thirtieth day of March, 1994,

ORDERED that defendant's motion for summary judgment be, and hereby is, granted; it is further

ORDERED that judgment be, and hereby is, entered in favor of defendant Allied Investment Corporation; and it is further

ORDERED that this case be, and hereby is, dismissed.

/s/ Norma Holloway Johnson
UNITED STATES DISTRICT
JUDGE

United States Court of Appeals
For The District of Columbia Circuit

Nos. 94-7078, 94-7151 — September Term, 1994 — 90cv01802

PRIMEDICAL, INC., et al.,

Plaintiffs-Appellants

v.

ALLIED INVESTMENT CORP. ET, AL.,

Defendants-Appellees

Filed March 13, 1995
U.S. COURT APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

On Appeal from the United States District Cort for the District of Columbia

JUDGMENT

This cause came to be heard on appeal from judgments of the United States District Court for the District of Columbia, and it was briefed and argued by counsel. The issues have been accorded full consideration by the Court and occasion no need for a published

opinion. *See* D.C. Cir. 36(b). For the reasons stated in the accompanying Memorandum, it is

ORDERED and ADJUDGED, by the Court, that in No. 94-7078 and NO. 94-7151, the judgment of the United States District Court for the District of Columbia is affirmed.

The Clerk is directed to withhold issuance of the mandate herein until seven days after the disposition of any timely filed petition for rehearing. See D.C. Cir. Rule 41(a).

Per Curiam
For the Court

By:

/s/ Marilyn R. Sargent
Deputy Clerk

MEMORANDUM

Appellants are Primedical Incorporated, an owner and operator of health care facilities, and a number of corporate and individual investors who allege interests in PMI (collectively "PMI"). This suit arises from an agreement between PMI's principals and Allied Investment Corporation ("Allied") to create a third company, Primedical Corporation ("PC"), to purchase a number of health care clinics. PMI believes that it was entitled to an ownership share of PC that, in the end, went to Allied. PMI appeals the district court's entry of summary judgment in favor of Allied on PMI's breach of fiduciary duty, tortious interference with business relationship, breach of contract, and conversion claims. We have elected to dispose of this appeal by unpublished order because what appears on the record to be the most substantia argument in the appellants' favor was not properly raised below. We therefore affirm for substantially the reasons articulated by the district court.[1]

Appellants, principal argument on appeal challenges the district court's ruling that their breach of fiduciary duty and tortious interference with business relationship claims were barred by the applicable three-year limitations period contained in D.C. CODE ANN. §12-301(8). The court, applying the traditional "date-of-

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[1]The rulings on review are all captioned *Primedical, Inc. v. Allied Investment Corp.*, Civ. No. 90-1802. They were issued on March 11, 1993, March 31, 1994, and July 15, 1994. All references to "*Primedical*" in this Memorandum are to the March 31, 1994 Memorandum Opinion.

the-injury" rule, reasoned that these claims accrued when the capital structure of PC was established and PMI did not receive the interest that it expected, which occurred more than three years before PMI initiated this suit. *Primedical* at 4-6. PMI contends that this was error because the District of Columbia employs the "discovery rule" to determine when some tort causes of action--those where the fact of injury may not be readily discernible at the time actually incurred--accrue. *See, e.g., Ehrenhaft v. Malcolm Price, Inc.*, 483 A.2d 1192, 1201 (D.C. 1984). Appellants claim they did not "discover" that they had been "frozen out" of PC until long after the new company's capital structure had been established.

This argument is inherently paradoxical, because PMI's principals, Stanford Ellsworth and Randolph Old, were involved in the formation of PC and in fact received ten percent of the new company for themselves. One would therefore expect that PMI "discovered" the alleged injury at the time PC's capital structure was set. Appellants attempt to redeem the claim, however, by arguing for the first time on appeal that Old and Ellsworth conspired with Allied to conceal PC's capital structure from the rest of PMI for over a year; they protest that innocent PMI investors should not be punished for the misdeeds of their "insider" principals.

We think it unnecessary to reach the question whether appellants' creative "conspiracy" theory, if properly presented to the district court, would have permitted them to successfully oppose summary judgment on their fiduciary duty and tortious interference with

business relationship claims. The fact is that this theory was not argued below. We find no trace of it in PMI's Complaint. Nor did appellants raise the theory in their response to Allied's motion for summary judgment. Instead, PMI relied heavily on the deposition testimony of Old and Ellsworth throughout the proceedings below, without ever intimating that they were hostile parties. Under these circumstances, the district court understandably did not consider that appellants' alleged injury might have been "discovered" long after it was incurred, and we will not do so for the first time on appeal. *Cf. Marymount Hospital v. Shalala*, 19 F.3d 658, 663 (D.C. Cir. 1994) (holding that arguments not raised below are presumed waived).

PMI also argues, citing *Goldman v. Bequai*, 19 F.3d 666 (D.C. Cir. 1994), that the question when their claims accrued was for the jury, not the district court. This argument misunderstands *Goldman*. It is true in many cases that "what a plaintiff knew and when she knew it, in the context of statute of limitations defense, are questions for the jury." *Id.* at 672 (internal quotations and citation omitted). In particular, "summary judgment is not appropriate [in a "discovery rule" case] . . . if there is a genuine issue of material fact as to when, through the exercise of due diligence, the plaintiff knew or should have known of her injury." *Id.* (internal quotations and citation omitted). But, as we have noted, PMI did not present its "conspiracy" theory to the district court, and so there was no "genuine issue of material fact" as to whether PMI know they had been shut out of PC at the time their principals entered the agreement establishing the capital

structure of the new company. *Goldman* is therefore inapposite.

A final point that bears explication concerns the district court's reasoning in granting summary judgment on PMI's conversion claim. The district court relied on the common law rule that intangible property interests are not subject to conversion. *See, e.g., The Equity Group, Ltd. v. Painewebber Inc.*, 839 F.Supp. 930, 933 (D.D.C. 1993). The status and contours of that rule are uncertain in this circuit, and we think it unnecessary to reach the question in order toffirm the disposition below.

At oral argument, appellants clarified that they have not alleged conversion of "intangibles" in the traditional sense. Rather, the primary "conversion" claimed is that of PMI's alleged interest in PC, as represented by common shares of PC eventually issued to Allied. As the district court observed, however, PMI never acquired this purported ownership in interest in PC. Because a conversion claim clearly may no be asserted as to property one does not own, *see e.g., Duggan v. Keto*, 554 A.2d 1126, 1137 (D.C. 1989), this claim was properly dismissed as a matter of law.

As the district court noted, PMI has also argued that a "wrongful commingling of PMI and PC" amounted to conversion of PMI's assets by Allied. The court, however, found that there was no conflict in the evidence that "PC and PMI maintained separate bank accounts and that their funds were not commingled." *Primedical* at 15. The court further noted that "plaintiffs [have not] pointed

to any evidence in the record that PC ever used a single . . . chattel belonging to [PMI]." *Id.* Therefore, the court properly found that appellants had not carried their burden on this claim to designate "specific facts showing that there is a genuine issue for trial." *Id., citing Celotex Corp. v. Catreet*, 477 U.S. 317, 324 (1986).

United States Court of Appeals
For The District of Columbia Circuit

No. 94-7078 September Term, 1994
USDC CV 90-1802

Primedical, Inc., et al.	)
	)
Appellants,	)
v.	)Filed
	)April 07, 1995
Allied Investment Corp.;	)U.S. COURT OF
Primedical Corp.;	)APPEALS
Humana, Inc.,	)FOR THE
	)DISTRICT OF
Appellees.	)COLUMBIA
	)CIRCUIT

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and Consolidated Case No. 94-7151

BEFORE: Wald, Randolph and Rogers,
Circuit Judges

ORDER

Upon consideration of appellant's Petition for Rehearing, filed March 24, 1995, it is

ORDERED, by the Court, that the petition is denied.

FOR THE COURT:
Mark J. Langer, Clerk

BY:

/s/ Robert A. Bonner
Deputy Clerk